IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3285 OF 2003

Deepak N. Modi (Jain) and Anr. ...Petitioners

Versus

Sukhadeo V. Patil & Ors. ...Respondents

Shri P.K.Dhakephalkar for the Petitioners.
Shri P.b.Shah for respondent No.1.

CORAM : S.C. DHARMADHIKARI, J.
DATE : JANUARY 19, 2006.

P.C.:

1. This Writ Petition under Article 227 of the Constitution of India challenges an order passed by the learned Additional District Judge, Malegaon on 28th April, 2003 in Civil Miscellaneous Appeal No.87 of 2001.

2. This Civil Appeal was directed against an order of the trial Court passed on 19th October, 2001 in Regular Civil Suit No.536 of 2000. In this Suit, an application was made for temporary injunction by respondent Nos.1 & 2, who are the original plaintiffs, seeking to restrain the petitioners, who are defendant Nos.2 & 3, from firstly making further construction over the suit land and alienating the flats to purchasers till disposal of the suit, as also from utilising a septic tank constructed towards western

side and infront of the suit property. According to respondent Nos.1 & 2 (Original plaintiffs) it is an encroachment on Municipal road. The restraint order against the Malegaon Municipal Council restraining issuance of completion certificate was also sought in this Suit.

3. It is not necessary to make a detailed reference to the allegations in the plaint and versions of the parties. From a perusal of the order passed by the trial Court, it appears that, the trial Court was not satisfied that prima-facie case is made out nor was it satisfied that balance of convenience lies in favour of the original plaintiffs. There are certain observations made in regard to the right of the original plaintiffs to file the Suit and to seek injunction in terms aforesaid. It is also clear that the stand of the Municipal Council before the trial Court was that the construction of the building as well as the septic tank is in accordance with the permission granted and if any unauthorised or illegal construction is put up the same would be taken care of in accordance with the provisions of law. Consistent with the versions before the Court, the trial Court refuses to grant injunction and vacates the ad-interim order of status-quo granted earlier.

4. The grievance of Shri Dhakephalkar appearing for the petitioners is that before the lower Appellate Court in Appeal, the lower Appellate Court on its own, sought a report with regard the construction of the septic tank and recorded that the stand of the Municipal Council is that construction of septic tank amounts to encroachment on a Municipal road. The lower Appellate Court has recorded that the petitioners expressed readiness and willingness to shift the septic tank within their own plot. However, Shri Dhakephalkar states that once the trial Court has accepted the version of both Municipal Council as well as the petitioners, there was no occasion for the petitioners to have made any such concession and infact no such concession was ever made. He submits that the lower Appellate Court has not faulted the trial Court, but, on its own, took up for consideration the prayer of the original plaintiffs for removal of the septic tank, which is not the main relief prayed in the temporary injunction application also.

5. Shri Shah appearing for the original plaintiffs on the other hand submits that the approach of the lower Appellate Court in firstly ascertaining as to whether there is any obstruction as well as

nuisance by the presence of the septic tank, and thereafter directing the officers of the Council to visit and make appropriate report, is in consonance with the prayers in the Suit and in any event does not warrant interference of this Court under Article 227 of the Constitution of India.

6. In my view, the Civil Suit is filed in the year, 2000. The order under challenge was passed on 28th April, 2003. The petitioners applied to this Court after the Writ Petition was filed on 30th April, 2003 for urgent ad-interim orders and this Court granted ad-interim orders in terms of prayer clause (b) of the Writ Petition. The effect is that the order passed by the lower Appellate Court directing the petitioners to remove the septic tank has been stayed from the date the said order was passed. In fact, the direction by the Appellate Court was to the respondent No.1 Municipal Council (respondent No.3 in the present petition) to destroy the septic tank. Once this order is stayed and the septic tank has not been removed from site, it would not be fair, just and proper to go into the rival contentions on merits.

7. The Suit is ripe for hearing and interest of justice would be served if the trial Court is directed to expedite its hearing and dispose of the same by the

end of 31st August, 2006. This course is also adopted because of the fact that the order under challenge is virtually the final order in the suit and it would be desirable that evidence is led and such directions issued only after the Court below is satisfied that a case, for issuing the mandatory directions and orders against the Municipal Council, is made out by the original plaintiffs.

8. All contentions on merits are expressly kept open and the Court below to decide the Suit uninfluenced by the observations made in the order under challenge as also the order of status-quo passed by this Court.

(S.C.DHARMADHIKARI,J.)